

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

MYRON SPEARS,)	CASE NO. 5:06 CV 1267
)	
Petitioner,)	JUDGE DAN AARON POLSTER
)	
v.)	
)	<u>MEMORANDUM OF OPINION</u>
MICHELE EBERLIN,)	<u>AND ORDER</u>
)	
Respondent.)	

On May 16, 2006, petitioner pro se Myron Spears filed the above-captioned petition for writ of habeas corpus under 28 U.S.C. § 2254. Spears is incarcerated in an Ohio correctional institution, having been convicted of felonious assault with firearm specification, kidnapping, and aggravated burglary, pursuant to a guilty plea, in April 2001. For the reasons stated below, the petition is denied and this action is dismissed.

A federal court may entertain a habeas petition filed by a person in state custody only on the ground that he is in custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). In addition, petitioner must have exhausted all available state remedies. 28 U.S.C. § 2254(b).

As grounds for relief, petitioner asserts that his 10 year sentence violates the principles set forth in United States v.

Booker, 543 U.S. 220 (2005) and Blakely v. Washington, 542 U.S. 296 (2004). He further claims that the court should find "cause and prejudice" for his decision not to appeal the denial of a postconviction motion he filed in the Ohio Court of Common Pleas, wherein he sought to raise this issue.

Without the regard to the merits of Spears's assertions, it is evident on the face of the petition that he has yet to appeal his sentence, an avenue still available to him under Ohio Appellate Rule 5. His petition is thus premature.

Accordingly, pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the petition is denied and this case is dismissed without prejudice. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis on which to issue a certificate of appealability. Fed.R.App.P. 22(b); 28 U.S.C. § 2253.

IT IS SO ORDERED.

/s/Dan Aaron Polster 7/24/06
DAN AARON POLSTER
UNITED STATES DISTRICT JUDGE